

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 533587 and Merchant Mariner's
Document No. 093293

Issued to: JACK P. LYONS

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2454

JACK P. LYONS

This appeal has been taken in accordance with 46 U.S.C. § 7702 and 46 CFR Part 5, Subpart J.

By order of 3 October 1986, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license and merchant mariner's document outright for one year, plus an additional three months remitted on eighteen months probation, upon finding proved the charge of misconduct. The specification found proved allege that Appellant did, under the authority of the captioned license, while serving as pilot aboard the M/V FEDERAL CALUMET, at or about 8:00 p.m. on 25 November 1985, wrongfully direct the movement of the vessel in St. Louis Bay, Superior, Wisconsin, while under the influence of an intoxicant.

The hearing was held at Duluth, Minnesota, on 21 May 1986. Appellant was present at the hearing, and was represented by professional counsel. He denied the charge and specification.

The Investigating Officer introduced in evidence the testimony of three witnesses, and also introduced five exhibits.

Appellant introduced one exhibit and the testimony of one witness.

The complete Decision and Order of the Administrative Law Judge was served on Appellant on 9 October 1986. Appeal was timely filed on 13 October 1986, and was perfected on 25 November 1986.

FINDINGS OF FACT

Appellant was, at relevant times on 25 November 1985, serving as pilot of the M/V FEDERAL CALUMET (CALUMET) under the authority of the captioned license.

On that evening Appellant was assigned to serve as pilot of the CALUMET for a move of the ship from one grain elevator dock to another in St. Louis Bay, Superior, Wisconsin. St. Louis Bay is a

navigable water of the United States. The CALUMET is a diesel powered cargo vessel of 20,182 gross tons. The weather conditions at the time of the move were somewhat adverse. It was dark and cold, with winds of twenty to twenty-five knots. It had snowed earlier in the evening, but the record is not clear as to whether it was snowing during the move. The entire moving operation took two to three hours.

While Appellant was going to the CALUMET's berth, the car he was driving was observed to be in a hit-and-run collision with another car by an off-duty officer of the Superior police force. The officer followed Appellant's car to the dock area, then called the police dispatcher for a squad to respond.

Two officers from the Superior police force, Officers Pukema and Narveson, responded. Upon arrival, they were told by line handlers that the car in question had been driven there by the ship's pilot.

The officers demanded to speak with the pilot before the ship got underway. Appellant told the officers that he had driven the car, but that he did not have time to talk to them. He told the officers that another ship was coming to that berth, and that he had to get the CALUMET moved. The officers demanded that Appellant at least turn over his driver's license to them. They were then allowed aboard the CALUMET.

In a brief (approximately two minutes) conversation with Appellant, Officer Pukema obtained his driver's license and retained it for identification, and concluded that Appellant was intoxicated. He reached this conclusion based on Appellants slurred speech, red, glassy eyes, manner of standing, and the smell of alcohol on his breath.

The officers then left the ship and allowed it to be moved to the other dock. They went to the other dock and waited for the CALUMET to arrive.

The move of the CALUMET was accomplished without incident. When it arrived, Officers Pukema and Narveson went aboard to speak with Appellant, and eventually arrested him for driving while intoxicated and hit-and-run. During this second conversation with Appellant, Officer Narveson concluded that Appellant was intoxicated, based on a strong smell of alcohol. The driving while intoxicated and hit-and-run charges against Appellant were still pending at the time of the hearing in this case.

Officer Pukema had approximately eleven and a half years

experience as a police officer at the time of this incident, and had observed intoxicated people in the course of his duties on at least 1,000 occasions. Officer Narveson had almost six years police experience at the time of this incident, and had also observed intoxicated people on many occasions.

Appellant was under the influence of intoxicants when he directed the movement of the CALUMET as pilot.

Appellant had no record of prior actions against his license or document by the Coast Guard in over fifty years of sailing.

BASES OF APPEAL

Appellant base this appeal on the following contentions:

(1) The Administrative Law Judge erred by finding the charge of misconduct proved because there was no marine incident or accident, or failure of Appellant to perform his duties.

(2) The Administrative Law Judge erred by imposing a particularly harsh suspension order on Appellant based upon Appellant having been previously "charged" on two occasions with driving a motor vehicle while intoxicated.

Appearance: Chestnut & Brooks, P.A., Minneapolis, Minnesota, by Karl L. Cambronne.

OPINION

I

Appellant contends that it was error for the Administrative Law Judge to find the charge of misconduct proved because there was no marine accident or incident, or failure of Appellant to perform his duties during the move of the CALUMET a alleged or proved. I do not agree.

As a practical matter, incidents of operating under the influence of an intoxicant do not usually come to the attention of the Coast Guard unless some additional incident occurs. However, additional incidents are not required to support a charge of misconduct by operating a vessel while under the influence of an intoxicant; it is misconduct in itself. Appeal Decisions 2406 (ZOFCHAK), 2357 (GEESE), and 2356 (FOSTER).

This conclusion is especially important in a situation such as this case, where the operator is a pilot moving a large ship in restricted waters. The responsibility of a pilot for the safety of

the ship, its crew, and its cargo is enormous. The ship's Master and crew are not likely to be familiar with the waters the pilot is conning the ship through; they rely on the pilot's special knowledge and skills. See Appeal Decisions 1077 (COLLINS), 995 (SAUNDERS), 830 (BLANCHARD), and 456 (SEARS). The ship is frequently on with which the pilot is not familiar. These factors make it vital that a pilot not be impaired in his abilities while piloting a ship. Piloting a ship while the influence of an intoxicant is a failure to fulfil the pilot's responsibilities, and therefore misconduct.

The finding of the Administrative Law Judge that Appellant was under influence of an intoxicant when he piloted the CALUMET is clearly supported by substantial evidence. This evidence consists of testimony by two police officers, each with considerable experience in dealing with people under the influence of intoxicants, that Appellant was under the influence of an intoxicant at the time in question.

II

Appellant contends that it was error for the Administrative Law Judge to rely on two unexplained prior "charges" of driving a motor vehicle while intoxicated as information in aggravation when formulating her order of suspension. I agree.

The regulations governing these proceedings are quite specific the information that may be used by the Administrative Law Judge in aggravation. The regulations provide that such information is "limited to the following items less than 10 years old: (1) ... (4) any final judgments of conviction in State or Federal courts; (5) ..." 46 CFR §5.565(A) [emphasis added]. Mere charges or arrests cannot be considered in aggravation.

The Administrative Law Judge, in considering the severity of the order to be imposed upon Appellant, stated that she was influenced by previous charges against Appellant of driving while intoxicated in 1980 and 1982. (Decision and Order at 13-14). The source of this information was a statement contained in Exhibit 5 that Appellant "was charged with the same offense [operation a car under the influence of an intoxicant] in 80 and again in 82." Exhibit 5 is a City of Superior, Wisconsin, Supplementary Incident Report concerning this incident filed by Officer Pukema. (TR at 84-86). There is no evidence in the record that Appellant was ever convicted of driving while under the influence of an intoxicant. Considering the charges as information in aggravation was clearly error by the Administrative Law Judge.

CONCLUSION

The Administrative Law Judge's finding that Appellant piloted the CALUMET while under the influence of an intoxicant is supported by substantial evidence. Operation a vessel while under the influence of an intoxicant is misconduct in itself; there is no requirement of a marine accident or incident, or failure to perform duties in order to constitute misconduct. However, procedural error by the Administrative Law Judge in considering improper information in aggravation causes me to conclude that the order of suspension should be vacated.

ORDER

The findings of the Administrative Law Judge dated at St. Louis, Missouri, on 3 October 1986 are AFFIRMED. The order is VACATED.

J.C. IRWIN
Vice Admiral. U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 26th day of June, 1987.